In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1597

CONTINENTAL BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–9) is not yet officially reported. The decision of the Federal Communications Commission (Pet. Supp. App. I, 1–24) is reported at 15 F.C.C. 2d 120–132, and the Commission's memorandum opinion and order denying reconsideration and rehearing (Pet. Supp. App. II, 1–10) is reported at 17 F.C.C. 2d 485–490. The hearing examiner's initial decision, not reprinted by petitioner, is reported at 15 F.C.C. 2d 133–246.

425-365—71

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on January 5, 1971, and rehearing was denied (Pet. App. C) on February 10, 1971. The petition for a writ of certiorari was filed on April 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission's refusal to renew petitioner's radio station licenses for a one-year probationary period because of misconduct and misrepresentations made possible by petitioner's failure to exercise adequate control and supervision over the station, was unreasonably discriminatory.

STATUTES INVOLVED

Sections 308(a) and 309(a) of the Federal Communications Act, 48 Stat. 1084, 1085, as amended, 47 U.S.C. 308(a), 309(a), provide in pertinent part:

> § 308(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it * * *.
>
> § 309(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of

such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

STATEMENT

In 1963 and 1964 the Federal Communications Commission investigated the operations of WNJR, a radio station in Newark, New Jersey, licensed to petitioner (Pet. App. A–2),[1] to determine whether the licensee had properly kept program logs and had filed time brokerage contracts with the Commission, particularly in regard to a program called "Celebrity Time" (Pet. Supp. App. I, 4–7). Petitioner meanwhile had applied for renewal of its license. The Commission, as a result of its investigation, designated this application for hearing and specified a series of issues to determine whether petitioner possessed the necessary qualifications to retain the license; whether it had misrepresented facts or was lacking in candor; whether it had properly identified sponsors, properly kept program logs and filed time brokerage contracts with the Commission as required by Commission regulations; and whether the principals of petitioner had exercised adequate supervision of WNJR's operations (Pet. App. A–2–4).[2]

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[1] Petitioner Continental is a wholly-owned subsidiary of Rollins, Inc., which in turn has control of seven AM, three TV and two FM stations (Pet. Supp. App. I, n. 1).

[2] The Commission did not set as an issue the licensee's programming performance, and the parties did not offer evidence on that issue to the examiner (Pet. App. A–9).

After a lengthy hearing the examiner found that during the investigation, WNJR's general manager had failed to disclose relevant documents, had made false statements and had supplied false documents to the Commission concerning advertising contracts for "Celebrity Time." He further found that the station failed to file time brokerage contracts for that program and to keep accurate program logs. This misconduct, the examiner found, was calculated to conceal the actual facts concerning the station's practices in connection with the program. The examiner finally found that the licensee did not exercise adequate control or supervision over the operation of the station (Pet. Supp. App. I, 4–7). He concluded, however, that petitioner's license should be renewed for a one-year probationary period.

On exceptions by the Commission's Broadcast Bureau, the Commission reversed the examiner and denied the application for renewal (Pet. Supp. App. I, 1–23). Petitioner did not challenge the examiner's extensive findings of fact. After carefully considering those findings, the Commission concluded that even a minimal degree of responsible supervision by WNJR's principals could have prevented the gross misconduct and fraud on the Commission in which the station manager had engaged and that, in the circumstances of this case, the licensee must be held responsible for its conduct (Pet. Supp. App. I, 7, 17). It therefore concluded "that the applicant has not reflected the necessary qualifications to continue to be the licensee of WNJR," (Pet. Supp. App. I, 4) and that renewal would not serve the public interest.

In denying petitioner's request for reconsideration and rehearing (Pet. Supp. App. II, 1–10), the Commission also denied petitioner's request that the record be reopened so that evidence could be offered about WNJR's past programming performance. It pointed out that WNJR had not sought to introduce programming evidence during the hearing; on the contrary, "when asked about the matter by the examiner, counsel for WNJR stated that he did not intend to make any overall program showing by way of mitigation * * * and further stated that 'The question of actual programming was not in issue' " (Pet. Supp. App. II, 7). In any event, evidence of public service programming would not have been decisive in the Commission's view because of the "gross misrepresentation and fraud practiced on the Commission by the licensee" (Pet. Supp. App. II, 8).

The Commission also distinguished several of its recent actions, which petitioner claimed demonstrated "a disparity in the treatment of WNJR and other licensees" (*id.*).

On petitioner's appeal, the court of appeals concluded that in the light of the findings of misconduct and fraud, "the Commission acted reasonably and within its discretion in finding that renewal of Continental's license would not be in the public interest" (Pet. App. A, 6–7). The court also ruled that there was no merit to petitioner's claim of discriminatory treatment (*id.* at 7–8); that there was rational support in the record for the Commission's rejection of the licensee's tardy corrective measures (*id.* at 8);

and that the Commission was justified in concluding that the proffer of programming evidence came too late (*id.* at 9).

ARGUMENT

The Commission's action, unanimously affirmed by the court of appeals, is correct and presents no issue warranting plenary consideration by this Court.

Petitioner's contentions that the Commission unfairly discriminated against it by refusing a probationary renewal (Pet. 9, 15) are without merit. It is well-established that whether an applicant is fit to receive a license is a matter for "* * * the Commission, not the courts, which must be satisfied that the public interest will be served by [granting] the license." *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229. And the Commission is not bound "* * * to deal with all cases at all times as it has dealt with some that seem comparable." *Id.* at 228. The determination whether an applicant is fit to receive a renewal of its license must necessarily turn on the facts of each particular case. As both the Commission and the court of appeals recognized, the facts of this case are significantly different from the facts of the cases upon which petitioner relies. The degree of fraud and misconduct here justified the Commission's exercise of its discretion to refuse to grant a one-year period of probation.[3]

[3] As in the court of appeals (Pet. App. A–6), there is no dispute between the parties here concerning the findings of misconduct. The issue is only the degree to which petitioner is to be held responsible for the misconduct of the station manager.

The Commission's refusal, upon the petition for reconsideration, to reopen the record to appraise the licensee's program performance was entirely reasonable. Where the licensee is disqualified because of fraud, the Commission need not consider past programming at all. *Immaculate Conception Church of Los Angeles* v. *F.C.C.*, 320 F. 2d 795, 797 (C.A.D.C.), certiorari denied, 375 U.S. 904.[4] Moreover, petitioner had declined to present evidence of programming in mitigation of its misconduct during the hearing and raised the matter only after the Commission had rendered its decision (Pet. App. A–9). At that late stage, the Commission was justified in refusing to reopen the record.

Petitioner's argument that the Commission discriminatorily refused "to consider the licensee's corrective measures * * * " (Pet. 15) is also without merit. The Commission in fact carefully considered petitioner's efforts at corrective action (Pet. Supp. App. I, 12–14; Pet. Supp. App. II, 3–4), which the hearing examiner had set forth at some length.[5] But the Commission, as well as the hearing examiner, concluded that, not-

[4] The cases cited by petitioner (Pet. 11–13) are not in point, for they do not reveal misconduct connected with broadcasting as gross or as extensive as that of petitioner. In two of these cases, *Westinghouse Broadcasting Company*, 22 R.R. 1023, and *General Electric Co.*, 2 R.R. 2d 1038, the misconduct occurred not in broadcasting but in the distinct and separate fixing of prices of heavy electrical equipment. In *Hall* v. *Federal Communications Commission*, 257 F. 2d 626 (C.A.D.C.), the Commission had determined that the misrepresentation was not wilful, *The Spartan Radiocasting Co.*, 23 F.C.C. 106, 112; the same is true of *The Northern Corporation*, 15 F.C.C. 60, 83.

[5] *Continental Broadcasting, Inc.*, 15 F.C.C. 2d 133, 234–236.

withstanding these efforts, the petitioner had seriously failed to exercise the degree of responsible supervision over station operations which may be expected of a licensee (Pet. Supp. App. I, 17; Pet. Supp. App. II, 3–4). The evaluation of such matters is peculiarly a task for the Commission, and, as the court of appeals stated, the Commission's judgment that the "lack of supervision and control demonstrated intolerable irresponsibility" (Pet. App. A 8) was reasonable and should not be disturbed on review. See *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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